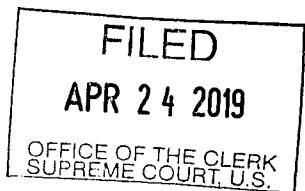


18-9128

ORIGINAL

No. \_\_\_\_\_



IN THE

SUPREME COURT OF THE UNITED STATES

SHAWN R. ERPELDING

— PETITIONER

(Your Name)

VS.

SCOTT FRAKES, Director, N.D.C.S. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF NEBRASKA

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHAWN R. ERPELDING #81027

(Your Name)

P.O. BOX 2500

(Address)

LINCOLN, NE 68542-2500

(City, State, Zip Code)

(none)

(Phone Number)

## QUESTION(S) PRESENTED

Does the State of Nebraska violate the 14th Amendment's privileges and immunities clause by arbitrarily denying committed offenders the privilege of a petition for a writ of habeas corpus?

(i)

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	5
REASONS FOR GRANTING THE WRIT .....	6
CONCLUSION .....	9

## INDEX TO APPENDICES

APPENDIX A - 12/12/18 Denial of application for original action

APPENDIX B - 12/12/18 Denial of Petition

APPENDIX C - 1/28/19 Motion for Rehearing denied

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

Page Number

United States Supreme Court Cases

Ex parte Siebold, 100 U.S. 371 (1879)	6, 8
Smith v. Bennet, 365 U.S. 708 (1961)	6
Timbs v. Indiana, ___ U.S. ___, 139 S.Ct. 682 (2019)	6

State Court Cases

Caton v. State, 291 Neb. 939 (2015)	7
Johnson v. Kenny, 265 Neb. 47 (2002)	7
Poindexter v. Houston, 275 Neb. 863 (2008)	7, 8
Sanders v. Frakes, 295 Neb. 374, 378-380 (2016)	6, 8
State v. Burlison, 255 Neb. 190, 195 (1996)	8
State v. Rhodes, 187 Neb. 332 (1971)	8
State v. Smith, 282 Neb. 720, 724-25 (2011)	8

Statutes and Rules

Nebraska Revised Statute § 29-2801	3, 5, 6, 7
------------------------------------	------------

United States Constitutions

Constitution of the United States of America, Article I., §9	3, 6
Constitution of the United States of America, Amendment XIV	3, 5, 6

State Constitutions

Nebraska Constitution, Article I., §8	3, 5
Nebraska Constitution, Article V., §2	4, 5
Nebraska Constitution, Article V., §9	8

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A & B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
 An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 12/12/2018. A copy of that decision appears at Appendix A & B.

A timely petition for rehearing was thereafter denied on the following date: January 28th, 2019, and a copy of the order denying rehearing appears at Appendix c.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's 14th Amendment "privileges and immunities" clause provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ...."

Article I, §9 of the U.S. Constitution makes the writ of habeas corpus a privilege for all citizens of the United States:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it."

Since 1998, Article I, §8 of the Nebraska Constitution says:

"The privilege of the writ of habeas corpus shall not be suspended."

Prior to the 1998 change, Article I, §8 of the Nebraska Constitution had said:

"The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

Since the late 1800's what is now Neb.Rev.Stat. §29-2801 has placed a limitation on who can obtain a writ of habeas corpus in Nebraska Courts by saying (emphasis added):

"If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce

to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing the writ is a judge, directed to the proper officer, person or persons who detains the prisoner."

Article V, §2 of the Nebraska Constitution provides the Nebraska Supreme Court with jurisdiction in habeas corpus cases as well giving the Court the only means of declaring a statute (an act of the Legislature such as Neb.Rev. Stat. §29-2801) unconstitutional (emphasis added):

"The Supreme Court shall consist of seven judges, one of whom shall be the Chief Justice. A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, election contests involving state officers other than members of the Legislature, and such appellate jurisdiction as may be provided by law. ...."

## STATEMENT OF THE CASE

The Petitioner, pursuant to Article V, §2 of the Nebraska Constitution and Court Rules, filed an application for an original action in the Nebraska Supreme Court seeking a writ of habeas corpus and the declaratory judgment that both the statutory offense under which he is incarcerated under and Neb. Rev. Stat. §29-2801, prohibiting offenders from filing petitions for writs of habeas corpus, were unconstitutional.

Without comment the Nebraska Supreme Court denied the application for the original action (Appendix A) and denied the petition for a writ of habeas corpus (Appendix B). The Petitioner filed a timely motion for rehearing and Brief in support thereof, which was denied without comment on January 28th, 2019 (Appendix C).

Here the Petitioner asserts the claim he raised in the Nebraska Supreme Court, that the 1998 change to Article I, §8 of the Nebraska Constitution eliminated the Legislative authority to prohibit offenders committed to prison from filing petitions for writs of habeas corpus; i.e., that the change to the state constitution rendered the "ancient" statute unconstitutional and in violation of the 14th Amendment's "privileges and immunitites" protection.

## REASONS FOR GRANTING THE PETITION

There are three reasons for granting the Petition.

### I.

First, the Nebraska Supreme Court's analysis of the Writ of Habeas Corpus is contrary to the U.S. Supreme Court's long-standing decision that it is a federal constitutional right to file a petition for a writ of Habeas Corpus; Smith v. Bennet, 365 U.S. 708 (1961). This Court has also allowed the facial constitutionality of the crime to be challenged by habeas corpus; Ex parte Siebold, 100 U.S. 371 (1879).

In addition, the U.S. Supreme Court has recently discussed the difference between the 14th Amendment's protections under the Due Process guarantee and under the "privileges and immunities" clause. Timbs v. Indiana, \_\_\_\_ U.S. \_\_\_\_ , 139 S.Ct. 682 (2019). While some members of the Court see a "substantive" Due Process protection in the 14th Amendment, others see only a protection against the "privileges and immunities" set out in the U.S. Constitution; Timbs, *supra*, (Gorsuch and Thomas, separately concurring). The Petitioner's case unistakably falls within the "privileges and immunities" clause because the U.S. Constitution explicitly calls the writ of habeas corpus a "privilege"; see, Article I, §9 of the U.S. Constitution.

### II.

Second, the Court needs to restore respect for the law. The Nebraska Supreme Court has selectively used their reliance upon and analysis of Neb.Rev.Stat. §29-2801 to arbitrarily deny the filing of petitions for writs of habeas corpus. See, for example, in Sanders v. Frakes, 295 Neb 374, 378-380 (2016), the Court's reliance upon the statutory limitation: "Eligibility for the writ is governed

by the criteria set forth in §29-2801. Section 29-2801 explicitly excludes from its scope 'persons convicted of some crime or offense for which they stand committed.'"

Yet the Nebraska Supreme Court gladly accepts Petitions from committed offenders when it wants to assert its activist ability to rewrite Legislative acts it does not like. In Johnson v. Kenney, 265 Neb 47 (2002) the statutory prohibition was NOT asserted against Johnson when he challenged the "good time" calculations under a "mandatory minimum" sentence. The Court "construed" the good time statutes in a manner contrary to the plain language to achieve their desired result of validating Johnson's sentence. The result has been a front page fiasco for the Department of Correctional Services because they were unable to decipher the Court's analysis. Dozens of offenders were released early and had to be rearrested later; see, Caton v. State, 291 Neb 939 (2015).

Even more harmful was the decision in Poindexter v. Houston, 275 Neb 863 (2008). The Court wanted to retroactively change Poindexter's life sentence for first-degree murder of a police officer into a "life without parole" sentence requiring a commutation. Poindexter had been convicted in 1971 when a life sentence did not have both a "minimum sentence" and a "maximum sentence." It was not until 1986 that the Legislature enacted a statute [§83-192(1)(f)(v)] that required those offenders with "minimum life sentences" to obtain a commutation before the Board of Parole would consider them eligible for parole. It was not until 2015 that the Legislature authorized a "minimum life sentence" for first-degree murder; Laws 2015, LB 605 §60.

But rather than dismissing Poindexter's habeas corpus petition under §29-2801, to give Poindexter a "minimum life sentence" the activist Court said:

"In ... and State v. Rhodes, [187 Neb 332 (1971)] we impliedly held that flat sentences do have minimum terms for purposes of the 1969 version of §83-1,110."

Poindexter, *supra*, 275 Neb at 867

Nothing could be further from the truth. Such a holding would also imply that there were no sentences WITHOUT minimum terms in 1969 or 1971. Rhodes flat 5 year sentence had no minimum term and made him eligible for parole under §83-1,110 because that 1969 statute said offenders were eligible for parole, "... or if there is no minimum, at any time." Obviously there WERE sentences (envisioned by §83-1,110) that had no minimum term. Had Rhodes' sentence been a minimum 5 years to a maximum 5 years he would not have been eligible for parole at all.

Poindexter is the case that is passed among inmates in the prison law library to show that the Nebraska Supreme Court lies and does not even live up to the State's motto, "Equality before the law." Requiring the Nebraska state courts to accept habeas corpus petitions from committed offenders would help to restore respect for the law by allowing those offenders, like the Petitioner and Sanders, *supra*, to challenge the state courts' authority to impose sentences for crimes that do not exist because their statutory basis is facially unconstitutional. Siebold, *supra*. [The Nebraska Supreme Court repeatedly says there are no common law crimes in Nebraska, all crimes are statutory; State v. Burlison, 255 Neb 190, 195 (1996); State v. Smith, 282 Neb 720, 724-25 (2011). The state courts' authority to impose sentences is limited as "prescribed by law" under Article V, §9 of the State Constitution.] Without the privilege of the writ of habeas corpus the sentiment of offenders

to not trust the law continue to grow within the most overcrowded state prison system (not under the control of the U.S. Department of Justice) in America. The Court's timely consideration of this issue would be seen as a positive influence.

### III.

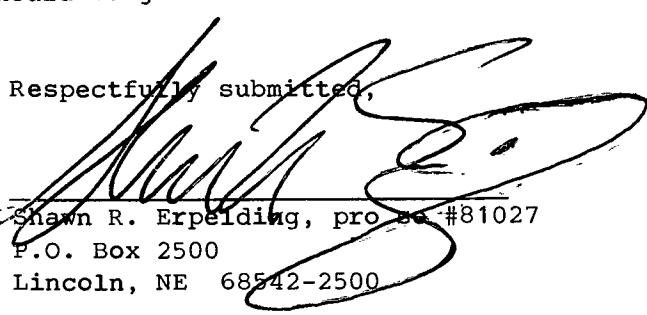
Third, the Court should reinstate the writ of habeas corpus before history repeats itself. The writ of habeas corpus is the bedrock legal procedure of western civilization. History, from Runnymede to Appommatix, teaches that whenever the Great Writ has been suspended there has always been widespread violence before it is restored. The Court should take this opportunity to prevent history from repeating itself and restore the Writ of Habeas Corpus in Nebraska.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Date: April 23, 2019

Respectfully submitted,

  
Shawn R. Erpelding, pro se #81027  
P.O. Box 2500  
Lincoln, NE 68542-2500